

**IN THE UNITED STATE DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA, et al.)	
)	
Plaintiff)	
)	
v.)	Case No. 4:05-cv-00329-JOE-SAJ
)	
TYSON FOODS, INC., et al)	
)	
Defendants.)	
_____)	

**TYSON CHICKEN, INC.’S REPLY ON ITS MOTION TO DISMISS COUNTS 4, 5, 6
AND 10 OF THE FIRST AMENDED COMPLAINT UNDER THE POLITICAL
QUESTION DOCTRINE**

In its Motion to Dismiss Counts 4, 5, 6 and 10 of the First Amended Complaint under the Political Question Doctrine, Tyson Chicken, Inc. (“Tyson”) demonstrates that plaintiffs seek to embroil this Court in the type of public policy issues which the federal courts have historically declined to adjudicate. Put simply, plaintiffs ask this Court to use the vehicle of one state’s common law to impose policy judgments on complex environmental issues that affect the entire region and to thereby supplant the duly-elected representatives of the people with regulation by litigation.

Plaintiffs’ Response fails to meaningfully address the arguments and authorities put forward in Tyson’s motion for several reasons. First, plaintiffs note that courts regularly entertain common law claims and argue that their common law claims must therefore pass muster under the political question doctrine. *See* Resp. at 7. This argument fails to recognize that a claim is not immune from the political question doctrine simply because it is stated under a common law cause of action. Indeed, many claims that have been rejected under the political question doctrine were stated under the common law. In fact, because common law claims

typically arise in areas where the political branches have not yet spoken (or alternatively can be used in an attempt to avoid the political branches' policy judgments), common law claims are *more*—not less—susceptible to abuse by litigants who would drag the courts into the political arena. Moreover, plaintiffs' argument elevates the label by which a claim is identified over the claim's substance and obscures the ways in which plaintiffs' claims differ radically from traditional tort actions.

Second, plaintiffs' argument that there is no political question because state tort law allegedly has not been preempted by the Clean Water Act confuses the separate and distinct issues of preemption and the political question doctrine. In any case, as defendants demonstrate in their other motions, plaintiffs' argument is simply mistaken as to the preclusive effect of the Clean Water Act.

Finally, plaintiffs fail to distinguish this case from *Connecticut v. American Electric Power Co. Inc.*, Nos. 04 Civ. 5669, 04 Civ. 5670, 2005 WL 2347900 (S.D.N.Y. Sept. 22, 2005), which applied the political question doctrine to reject a similar attempt to use the federal courts as a policy-making body. In fact, a straightforward application of *American Electric Power* to the allegations of the First Amended Complaint demonstrates that this case must be dismissed.

I. Common Law Claims Are Not Immune From Analysis Under The Political Question Doctrine

Contrary to plaintiffs' assertion, the applicability of the political question doctrine does not turn on how plaintiffs choose to label their claims. This point is most powerfully illustrated by the six different situations that the Supreme Court has identified as presenting a political question.¹ With the exception of “a textually demonstrable constitutional commitment” of the

¹ After exhaustively reviewing its earlier cases in the area, the Supreme Court in *Baker v. Carr*, 369 U.S. 186, 217 (1962), wrote:

issue to another branch of the government, in each situation the courts are commanded to look at functional realities rather than labels. *See Baker v. Carr*, 369 U.S. at 214 (setting forth a functional analysis for identifying political questions). Pointedly, the Supreme Court has never held that a claim that is pleaded as a traditional common law tort is immune from attack under the political question doctrine, and lower courts have held that common law tort claims can be non-justiciable under the doctrine. *See, e.g., Connecticut v. Am. Elec. Power Co.*, Nos. 04 Civ. 5669, 04 Civ. 5670, 2005 WL 2347900, at *5-7 (S.D.N.Y. Sept. 22, 2005) (holding that a claim plead as a common-law public nuisance presented a political question); *Sanchez-Espinoza v. Reagan*, 770 F.2d 202, 209 (D.C. Cir. 1985) (dismissing claims for nuisance and unspecified “tortious injuries” under the political question doctrine).

In their Response, plaintiffs point out that claims 4, 5, 6, and 10 of the First Amended Complaint all take the form of traditional common law torts or equitable claims. Resp. at 7. They then provide literally pages of string citations to cases where tort and equitable claims were found not to present political questions or have been decided by the courts. *See* Resp. at 10-11. Yet not a single one of the cases that they cited turned on the fact that the claim was styled as a

It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for non judicial discretion; or [4] the impossibility of a court’s undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

The Court has repeatedly reaffirmed its commitment to this essentially functional way of analyzing the political question doctrine. *See, e.g., Vieth v. Jubelirer*, 541 U.S. 267, 277-78 (2004) (quoting approvingly the foregoing language).

common law tort or equitable remedy. Rather, in each of the cases cited by the plaintiffs the court engaged in the functional analysis mandated by *Baker v. Carr* and its progeny, or alternatively the court did not discuss the political question doctrine at all.²

Although plaintiffs style their claims as nuisance, trespass, and prayers for equitable relief, the labels applied to the claims are irrelevant to the constitutional analysis. What matters is—as explained in Tyson’s original motion—plaintiffs are asking, as a functional matter, that this Court undertake the wholesale regulation of an entire industry in the absence of the necessary political choices that would render such regulation judicially manageable. *See Baker v. Carr*, 396 U.S. at 217 (stating that a political question is presented by “the impossibility of deciding [an issue] without an initial policy determination of a kind clearly not for judicial discretion”). Plaintiffs are asking this Court to review the operations of thousands of poultry

² *See Scheulfler v. Gen. Host Corp.*, 126 F.3d 1261 (10th Cir. 1997) (political question doctrine not discussed); *Mescalero Apache Tribe v. New Mexico*, 131 F.3d 1379, 1386 (10th Cir. 1997) (political question analyzed under the textually committed and no judicially manageable remedy tests); *McKay v. United States*, 703 F.3d 464, 470 (10th Cir. 1983) (analyzed according to whether question presented was a non-reviewable choice of the President and Congress); *Alperin v. Vatican Bank*, 410 F.3d 532, 545 (9th Cir. 2005) (emphasizing that political question claims must be examined under the six factors set forth in *Baker v. Carr*); *Owens v. Republic of Sudan*, 374 F. Supp. 2d 1, 28 (D.D.C. 2005) (analyzed under the textually committed power and judicial competence tests); *W.S. Kirkpatrick & Co., Inc. v. Envtl. Tectonics Corp., Int’l*, 493 U.S. 400, 409 (1990) (political question doctrine not discussed); *Int’l Paper Co. v. Oulette*, 479 U.S. 481 (1987) (political question doctrine not discussed); *Portage County Bd. of Comm’rs v. City of Akron*, 12 F. Supp. 2d 693 (N.D. Ohio 1998) (political question doctrine not discussed); *Moore v. Texaco*, 244 F.3d 1229 (10th Cir. 2001) (political question doctrine not discussed); *Satsky v. Paramount Commc’ns Inc.*, 244 F.3d 1229 (10th Cir. 1993) (political question doctrine not discussed); *Tosco Corp. v. Koch Indus. Inc.*, 216 F.3d 886 (10th Cir. 2000) (political question doctrine not discussed); *Biton v. Palestinian Interim Self-Government Auth.*, 310 F. Supp. 2d 172, 183 (D.D.C. 2004) (stating that the political question doctrine must be examined using the six-part framework set forth in *Baker v. Carr*); *Attorney Gen. of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 103 F. Supp. 2d 134, 145-46 (N.D.N.Y. 2000) (same); *Technical Rubber Co. v. Buckeye Egg Farm, Inc.*, No. 2:99-CV-1413, 2000 WL 782131 (S.D. Ohio June 16, 2000) (political question doctrine not discussed); *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria*, 937 F.3d 44, 49 (2d Cir. 1991) (stating the political question doctrine must be examined using the six-part framework set forth in *Baker v. Carr*).

houses in two states, *see* First Am. Compl. Ex. 5, and create and enforce new management practices on an entire industry without the scientific expertise and guidance of the Environmental Protection Agency, the United States Department of Agriculture, or the relevant state agencies. *See* First Am. Compl. ¶¶ 105, 116, 124, 147, “Prayer for Relief” ¶ 3. Such an undertaking would force this Court to make significant and difficult scientific and economic choices that are traditionally the purview of the political branches. It would also create the risk of “embarrassment from multifarious pronouncements by various departments on one question,” *Vieth v. Jubelirer*, 541 U.S. 267, 277-78 (2004), as both federal agencies and the two states involved in this dispute address the use of poultry litter as a fertilizer and soil amendment. Labeling the request that this Court decide such non-justiciable questions as a nuisance action or a trespass action does not thereby render it justiciable.

II. Plaintiffs Misstate The Scope Of Clean Water Act Preemption And Misunderstand The Difference Between Preemption And The Political Question Doctrine

Plaintiffs’ argument that their claims are not barred by the political question doctrine because the Clean Water Act does not preempt the application of non-point-source state common law is mistaken on two levels. First, as explained in defendants’ other motions, plaintiffs are simply wrong as to the preemptive effects of the Clean Water Act. *See* Tyson Food Inc.’s Mot. to Dismiss Counts 4-10 of the First Am. Compl. Second, and more fundamentally, the issue of preemption is wholly separate from the political question doctrine.

Preemption is a matter of the relationship between state and federal law and finds its constitutional basis in the Supremacy Clause. As one prominent commentator noted, “[p]reemption traditionally is found if a state law imposes obligations that are mutually exclusive with federal law, or if a state law frustrates the achievement of a federal objective, or if there is a clear congressional intent to preempt state law.” Erwin Chemerinsky, *Federal Jurisdiction* 368

(3d ed. 1999). *See also International Paper Co. v. Oullette*, 479 U.S. 481, 491-92 (1987) (discussing the test for preemption); *Milwaukee v. Illinois*, 451 U.S. 304, 316-17 (1981) (same). In contrast, the political question doctrine deals with the ability of the federal courts to decide certain types of issues and finds its constitutional basis in Article III. Because a non-justiciable political question can be presented by a claim brought under either state or federal law, the issue of preemption is irrelevant to the political question doctrine. *Compare Nixon v. United States*, 506 U.S. 224 (1993) (holding that the impeachment procedures for a federal judge present a non-justiciable political question), *with American Elec. Power Co.*, 2005 WL 2347900, at *5-7 (holding that a state-law public nuisance claim based on global warming presented a non-justiciable political question).

Simply put, the question of whether or not Congress has preempted state tort law with the Clean Water Act has no bearing on whether particular claims styled as common law claims present a non-justiciable political question. Preemption goes to the question of how broadly Congress has chosen to act in a particular field. The political question doctrine goes to the competence of the federal courts to address issues of public policy in the absence of meaningful standards established by the political branches of government. Hence, the preemptive effect of the Clean Water Act is irrelevant to the question of whether plaintiffs' nuisance, trespass, and restitution claims present a political question.

III. This Case Is Closely Analogous To *American Electric Power*

In *Connecticut v. American Electric Power Co. Inc.*, Nos. 04 Civ. 5669, 04 Civ. 5670, 2005 WL 2347900 (S.D.N.Y. Sept. 22, 2005), the court held that a public nuisance claim based on the defendants' alleged cross-boundary air pollution presented a non-justiciable political question. Plaintiffs do not suggest that *American Electric Power* was improperly decided. Rather, plaintiffs claim that it can be distinguished from the present case. *American Electric*

Power, however, presented a question so closely analogous to the present case that its unchallenged reasoning ought to control here.

Plaintiffs claim that *American Electric Power* can be distinguished from the current case because it presented foreign policy and national security concerns not present here. This argument, however, fails to appreciate the reasoning in *American Electric Power*. That case presented a political question not because there is some magic to whether alleged pollution crosses a national rather than state border, but because of the impossibility of deciding the case without “an initial policy determination of a kind clearly for political discretion.” *American Elec. Power Co.*, 2005 WL 2347900, at *7 (quoting *Vieth*, 541 U.S. at 278). In the present case, the plaintiffs’ claims ask this Court to make precisely the same kind of non-justiciable judgment in the absence of political decisions providing the necessary guidance.

In *American Electric Power*, the court was asked to use the common law of public nuisance to impose regulations on carbon dioxide emissions. The court refused to do so, noting that setting requirements for carbon dioxide emissions would be impossible without baseline decisions by political actors. If anything, the present case presents an even more complicated set of questions. In contrast to *American Electric Power*, which dealt with a single pollutant, plaintiffs’ complaint asks this Court to determine acceptable levels of phosphorus, nitrogen, arsenic, zinc, copper, hormones, microbial pathogens, and potentially other constituents in the absence of baseline decisions by politically responsible parties. *See* First Am. Compl. ¶ 58. The following table illustrates the striking congruence of the two cases:

<i>American Electric Power</i>	The Current Case
Court asked to impose common law standards on carbon dioxide beyond the requirements of the Clean Air Act. <i>American Elec. Power</i> , 2005 WL 2347900, at *6.	Court asked to impose common law standards on phosphorus, nitrogen, arsenic, zinc, copper, hormones, and microbial pathogens beyond the requirements of the Clean Water Act. First Am. Compl. ¶¶ 105, 116, 124, 147, “Prayer for Relief” ¶ 3.
Court asked to set appropriate levels at which to cap carbon dioxide emissions. <i>American Elec. Power</i> , 2005 WL 2347900, at *6.	Court asked to set appropriate levels at which to cap phosphorus, nitrogen, arsenic, zinc, copper, hormones, and microbial pathogens. ³ First Am. Compl. ¶¶ 105, 116, 124, 147, “Prayer for Relief” ¶ 3.
Court asked to set appropriate levels of reduction in carbon dioxide emissions. <i>American Elec. Power</i> , 2005 WL 2347900, at *6.	Court asked to set appropriate levels of reduction in emissions of phosphorus, nitrogen, arsenic, zinc, copper, hormones, and microbial pathogens. First Am. Compl. ¶¶ 105, 116, 124, 147, “Prayer for Relief” ¶ 3.
Court asked to set appropriate schedule on which reductions must be implemented. <i>American Elec. Power</i> , 2005 WL 2347900, at *6.	Court asked to set appropriate schedule on which reductions must be implemented. First Am. Compl. ¶¶ 105, 116, 124, 147, “Prayer for Relief” ¶ 3.

Plaintiffs attempt to distinguish *American Electric Power* by focusing on the narrow issues of foreign policy and national security. These narrow concerns are not what drove the decision in the case. Rather, the court’s primary concern was the “transcendentally legislative” issues involved in specific pollutant regulation in the absence of the necessary guidance from the

³ In paragraph 3 of the Prayer for Relief in their First Amended Complaint, Plaintiffs ask this court to enter an injunction “requiring each an all of the Poultry Integrator Defendants to immediately abate their pollution-causing conduct in the IRW” and to “take all such actions as may be necessary to abate the imminent and substantial endangerment to the environment.” See First Amended Complaint, “Prayer for Relief” ¶3. Such an injunction would necessarily require that this court determine (1) what levels of phosphorus, nitrogen, arsenic, zinc, copper, hormones, and microbial pathogens constituted “pollution”; (2) set levels of safe for phosphorus, nitrogen, arsenic, zinc, copper, hormones, and microbial pathogens; and, (3) set deadlines for the Tyson and the other defendants to comply with the injunction.

political branches. The present case presents precisely the same sort of “transcendentally legislative” questions.

CONCLUSION

For the reasons stated above and in Tyson’s original motion, counts 4, 5, 6, and 10 of the First Amended Complaint present non-justiciable political questions. Tyson respectfully submits that the motion to dismiss these claims should be granted. Tyson also requests such other and further relief as this Court may deem just and equitable under the circumstances.

DATED December 6, 2005.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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